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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANKLIN D. RAINES, *et al.*,

Appellants,

v.

SENATOR ROBERT C. BYRD, *et al.*,

Appellees.

On Direct Appeal from the United States
District Court for the District of Columbia

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the Line Item Veto Act violates Article I of the Constitution by delegating legislative authority to the President.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE DISTRICT COURT'S REASONING WOULD EVISCERATE THIS COURT'S NONDELEGATION DOCTRINE IN THE REGULATORY CONTEXT 3

II. REPRESENTATIVE DEMOCRACY DEMANDS ACCOUNTABILITY OF THE LEGISLATIVE BRANCH TO THE PEOPLE..... 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page

Arizona v. California, 373 U.S. 546, 626 (1963) 8

Bowsher v. Synar, 478 U.S. 714, 730 (1986) 8

Byrd v. Raines Slip op., Civ. No. 97-0001 (D.C. D.C. April 10, 1997) 4, 8

City of Rome v. United States, 446 U.S. 156, 207 (1980) 7-8

J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) 6

Loving v. United States, 517 U.S.___, 116 S. Ct. 1737, 1743, 1750 (1996) 4, 5, 6

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise, Inc., 501 U.S. 252, 273 (1991) 8

Miller v. Johnson, 515 U.S.___, 115 S. Ct. 2475, 2491 (1995) 7

Mistretta v. United States, 488 U.S. 361, 371-3 (1989) 6

United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 1639-40 (1995) 7

Statutes

Page

The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996) ..... passim

Miscellaneous

Ely, John H., DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, (1980) 6

Hamilton, Marci A., THE FIRST AMENDMENT'S CHALLENGE FUNCTION AND THE CONFUSION IN THE SUPREME COURT'S CONTEMPORARY FREE EXERCISE JURISPRUDENCE, 29 Ga. L. Rev. 81, 86-90 (1994) 8

Schoenbrod, David, GOALS STATUTES OR RULES STATUTES: THE CASE OF THE CLEAN AIR ACT, 30 UCLA Law Review 740 (1983) 7

Schoenbrod, David, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION, (1993) at 28-31 8

S. Rep. No. 9, 104th Cong., 1st Sess., at 15 (1995) 6

I

INTEREST OF AMICUS CURIAE[1]

The American Petroleum Institute ("API"), a non-profit corporation in the District of Columbia, is a national trade association. More than 300 companies are members and represent all facets of the petroleum industry, including exploration, production, transportation, refining and marketing. As such, they are often subject to and required to comply with onerous federal regulations which are created by federal agencies under statutes that delegate lawmaking authority under vague terms. In API's view, such statutes impermissibly delegate to these agencies the Congress' exclusive authority under the Constitution to legislate. API's members therefore have a vital interest in this Court's preservation of the nondelegation doctrine as it applies to improper regulatory excesses which are inherently legislative in nature.

The Parties have consented in writing to the filing of this brief.

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* hereby represents that no counsel for any party had any role in authoring this brief. *Amicus curiae* discloses that Professors of Law Marci A. Hamilton and David Schoenbrod, of The Cardozo School of Law and New York Law School, respectively, assisted in the preparation of this brief, for which they will receive compensation.

SUMMARY OF ARGUMENT

The Line Item Veto Act raises a constitutional question of first impression on which the *amicus curiae* does not take a position. Rather, this brief is being filed as a corrective to the seriously flawed reasoning of the district court, which would invalidate the Line Item Veto Act under this Court's nondelegation doctrine, but permit "vast" delegation of legislative authority to unelected federal agencies. *Amicus curiae* firmly believes that the practice of delegation of lawmaking authority to agencies is a serious threat to our constitutional order. Any opinion of this Court which followed the district court's reasoning would cause serious harm to the liberty-preserving structure of the Constitution.

The nondelegation doctrine is integral to the Constitution's purpose of protecting liberty. If embraced by this Court, the district court's reasoning would undermine legislative accountability and therefore the very power of the people to check the overreaching actions of their government.

This brief explains the errors of the district court's interpretation of the nondelegation doctrine and provides an overview of the constitutional significance of the nondelegation doctrine.

ARGUMENT

I. THE DISTRICT COURT'S REASONING WOULD EVISCERATE THIS COURT'S NONDELEGATION DOCTRINE IN THE REGULATORY CONTEXT

Amicus curiae does not take a position on the Line Item Veto Act's constitutionality.[2] The constitutionality of the Act is an issue of first impression that does not directly affect the interests of *amicus curiae*. Rather, this brief is being filed for the purpose of placing the district court's reasoning regarding delegation in constitutional perspective.

Of primary concern to *amicus curiae* is the district court's reasoning regarding congressional delegation of lawmaking authority. If affirmed by this Court, the district court's interpretation of the nondelegation doctrine would (1) erase much of this Court's nondelegation doctrine in the regulatory context and (2) place the Court's imprimatur on massive delegations of Congress' constitutionally appointed lawmaking authority to unelected and unaccountable agencies. What the district court says of the Line Item Veto Act applies at least as much to Congress' persistent delegation of lawmaking authority to unaccountable and unelected agencies who "make law" simply by publishing rules in the *Federal Register*.

While the Line Item Veto Act *may* be an example of Congress avoiding its difficult lawmaking responsibilities, the widespread practice of delegating substantial policy decisions to federal agency lawmaking certainly is. The district court characterized the Act as follows:

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[2] Nor does *amicus curiae* take a position on the standing and ripeness issues presented in this case.

> The Line Item Veto Act * * * hands off to the President authority over fundamental legislative choices. Indeed, that is its reason for being. It spares Congress the burden of making those vexing choices of which programs to preserve and which to cut. *Byrd v. Raines, slip op. 34-35, Civ. No. 97-0001 (D.C. April 10, 1997).*

On the district court's own reasoning, delegation to agencies violates the Constitution far more obviously than does the Line Item Veto Act.

Unfortunately and illogically, the district court erroneously narrowed application of the nondelegation doctrine in the regulatory context:

> It has long been held that Congress may -- indeed, of necessity, must -- delegate vast authority to the Executive Branch of government to make and to change rules for the governance of national affairs, so long as they are in furtherance of the will of Congress. *Id.* at 29.

The district court seems to assume that agency delegation is shielded from constitutional scrutiny while delegation to the President himself is not. Yet, delegation to agencies is no less constitutionally suspect. *Amicus curiae* specifically challenges the view that the power to "make and change rules for the governance of national affairs" "may" or "must" be delegated to the Executive Branch. Instead, in its last term, this Court held:

> The intelligible principle rule seeks to enforce the understanding that Congress may not

> delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes. *Loving v. United States*, 517 U.S. ___, 116 S. Ct. 1737, 1750 (1996).

The district court's erroneous reasoning has its roots in the expansive interpretation of Congress' power to delegate lawmaking to the Executive Branch found in the government's brief below. *See* Memorandum of Points and Authorities in Support of Defendants' Alternative Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 19-23. Interestingly, the Senators and Representatives challenging the Act did not focus the district court's attention upon this Court's nondelegation doctrine prohibiting the abdication of lawmaking responsibility, but rather took a more formalistic approach under Article I. Indeed, neither party's brief illuminated the lurking delegation problems that lay in the path of the district court's decision. Hence, the necessity of this *amicus curiae* brief at this stage.

The district court's logic is unpersuasive. It is not true that courts must be more tolerant when Congress delegates the power to make laws or authorizes expenditures than when it delegates the power to repeal laws or expenditures. The Framers crafted Article I, in fact, to make it more difficult for government to act by requiring that new laws and new expenditures be passed only after the House, Senate, and the President take responsibility for them. Under the district court's reasoning, however, such accountability is only necessary to stop regulation and spending, but not to initiate it. The district court's reasoning simply turns the nondelegation doctrine on its head. If the Line Item Veto Act distorts the Framers' deliberately chosen scheme of lawmaking, then the practice of delegating legislative prerogatives to unaccountable

and unelected agencies surely does so as well. Thus, regardless of whether the lower court reached the correct result in this case[3], its stated reasoning contravenes the reasonable application of this Court's "intelligible principle" rule in many other instances. *See Mistretta v. United States,* 488 U.S. 361, 371-3 (1989) *citing J. W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see also Loving v. United States*, 517 U.S.___, 116 S. Ct. 1737, 1743 (1996). Were this Court to embrace the district court's reasoning, it would seriously undermine the Framers' intent to require elected legislators to take responsibility for the laws that government imposes.

II. REPRESENTATIVE DEMOCRACY DEMANDS ACCOUNTABILITY OF THE LEGISLATIVE BRANCH TO THE PEOPLE

Liberty is possible only in a representative democracy where the legislators are directly accountable to the electorate. Congress must be prevented from deflecting its unique responsibility to make the country's hard policy choices -- through legislation -- if the "democracy" half of representative democracy is not to become a charade. As Professor John Ely has stated, "There can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are made by elected officials." DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) at 133.

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[3]If the Line Item Veto Act is unconstitutional, there may still be constitutional means to achieve the same end. For example, the expedited rescission proposal rejected by Congress. S. Rep. No. 9, 104th Cong., 1st Sess., at 15 (1995) (referring to S. 14). *Amicus curiae* does not take a position on the possibility that Congress might achieve the objectives of the Act (were the Act held unconstitutional) through lawmaking regarding the impoundment power.

Without the Constitution's accountability mechanism, elected officials naturally would be tempted to evade accountability. As John Adams put it in 1776, "As a good government is an empire of laws, the first question is, how shall the laws be made." Too often, legislative instructions from Congress to agencies typically amount to mere generalized recitations of competing and conflicting policy objectives, without *any* guidance as to how they should be reconciled -- for example, the environment should be made clean but without a loss of jobs. Schoenbrod, GOALS STATUTES OR RULES STATUTES: THE CASE OF THE CLEAN AIR ACT, 30 UCLA L. Rev. 740 (1983). When constituents complain to Congress about regulations that are allegedly too weak or too strong, legislators blame the agency; the regulations themselves rarely come up for a vote in Congress. Our elected lawmakers may thus cast themselves as heroes and their own creations -- the regulatory agencies -- as scapegoats. The broad delegation of legislative authority to federal agencies is ersatz democracy.

The Constitution requires this Court to leave the nation's policy choices to Congress. However, this Court holds the constitutional obligation to invalidate those laws that are the result of the Congress' abdication of its appointed constitutional role. *See United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 1639-40 (1995) (Kennedy, J., concurring); *Miller v. Johnson*, 515 U.S.___, 115 S. Ct. 2475, 2491 (1995). In Justice Rehnquist's words,

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government . . ., it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities.

City of Rome v. United States, 446 U.S. 156, 207 (Rehnquist, J., dissenting). That role is integral to the preservation of liberty when this Court is asked to consider whether the structure of the Constitution has been violated. "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). As the court below noted, this Court has " 'not hesitated to invalidate provisions of law which violate [the separation of powers.]' " *Byrd v. Raines*, slip op. at 21 (*quoting Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise, Inc.*, 501 U.S. 252, 273 (1991).

Both democratic accountability and liberty are undercut when Congress does not take affirmative responsibility for making laws. The nondelegation doctrine protects democratic accountability and therefore liberty. *See Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., concurring). This fundamental means of protecting liberty antedates, undergirds, and complements the protection of rights later enumerated in the Bill of Rights. David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION at 28-31 (1993); Marci A. Hamilton, THE FIRST AMENDMENT'S CHALLENGE FUNCTION AND THE CONFUSION IN THE SUPREME COURT'S CONTEMPORARY FREE EXERCISE JURISPRUDENCE, 29 Ga. L. Rev. 81, 86-90 (1994).

CONCLUSION

This Court is rightly reluctant to interfere with legislative outcomes and especially social policy choices. There should be no similar reluctance, however, to alert Congress of its non-delegable role to make those choices, by invalidating those laws in which Congress has abdicated its constitutionally designated lawmaking responsibility. Accordingly, we urge the Court to reject the district court's expansive reading of Congress' power to delegate lawmaking power to agencies and to craft a rule against delegation that ensures accountability and preserves liberty.

Respectfully submitted,

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